RECENT AMERICAN DECISIONS.

Supreme Court of Rhode Island.

JAMES ORR *v.* OSCAR A. TANNER.

An attorney who refuses to pay over money belonging to his client will be ordered to do so on motion of the client.

A contract between attorney and client that if anything is recovered the attorney is to receive one-half the amount obtained, after deducting expenses, is void for champerty.

MOTION for an order of court.

James Tillinghast, for the petitioner.

Oscar A. Tanner, pro se ipso.

The opinion of the court was delivered by

POTTER, J.—The complainant asks this court for an order on one of its attorneys requiring him to pay over certain money which he received in a suit brought for the complainant, and also for the money which the complainant paid said attorney for expenses, and for what the complainant has lost by the discontinuance of his case by the said attorney.

Some of the facts alleged by the complainant are denied by the respondent, but we think the undisputed facts in the case are sufficient to justify and require us to make an order against the respondent.

The complainant alleges that he placed in the respondent's hands for collection a claim for $593.18 against Thomas Pray, on an agreement that if anything was recovered the attorney was to take for his compensation one-half the amount obtained after deducting expenses. The complainant paid down to the respondent certain sums for expenses. A suit was brought, and the defendant's funds in a certain bank attached to the amount of $765.59. The defendant afterwards became bankrupt, but not until more than four months had elapsed after the attachment. The respondent afterwards discontinued the suit on receiving from Mr. Lapham, the attorney for the bankrupt defendant, the sum of $100. And of the receipt of this sum he gave the complainant no information.

The respondent's defence is that as it was doubtful whether he could recover, he had a right to compromise or discontinue the suit, and he agreed to do so on the defendant's attorney agreeing to pay him $100, which he says was for his attorney's fees and not as a part of the claim sued for.

The relation of attorney and client is a relation implying the utmost confidence and trust on the part of the client reposed in the attorney, and a corresponding obligation on the part of the attorney towards the client, which he should endeavor to perform faithfully, not merely from a sense of duty to his client, but from a sense of honor, as a member of an honorable profession whose character and estimation depend upon the individual character and reputation of its members. This relation implies that he is to look to his client alone for his compensation. To receive any compensation from the opposite party or his attorney, without the consent of his own client, is a breach of the trust reposed in him by his employer.

We regret that we are obliged to say this. But if, as the respondent contends, he did as he did because other attorneys of this court have indulged in such practices, while that fact may lessen the blame in this particular case, it becomes all the more necessary that the court should express its opinion that the practice is deserving of the severest censure, and utterly inconsistent with that character of honesty and honor which should belong to all the members of the profession.

And we feel bound to notice another fact which appears in the proceedings. According to the allegation of the complainant, and which is not plainly denied, the original agreement for compensation was champerty, and constitutes an indictable offence; and the practice, if it has become a practice, of making such agreements should be discouraged and condemned; and if in the course of legal proceedings in any case any such agreement should come to the notice of the court, we shall feel obliged to refer it to the attorney-general for his official action.

The charge of $100 was out of all proportion to the services rendered; but as he had no right whatever to take pay for his services from the opposite party, we must treat it as received for the use of the client, the complainant.

As there is no dispute about the receipt of this sum of $100, we shall make an order for the payment of it to the complainant and without any deduction. We think that is as far as we can go on the present application. Order accordingly.

1. Upon the first point arising in this case, there is no question as to the control of courts over their attorneys to enforce by summary process the prompt payment to clients of money collected for them. Such attorneys are not only debtors to their clients, liable to an action at law for money had and received,

like any other agents, but are also officers of the court, subject to their orders, bound to obey their decrees, and punishable for not doing so. The court may therefore, *upon motion*, direct the payment of a client's money, and in case of neglect or refusal imprison the attorney, or even strike his name from the rolls. See *In re Bleakley*, 5 Paige 311 (1835). And see *Dunn* v. *Vanderson*, 7 How. (Miss.) 579 (1843).

And the imprisonment in such cases is not an imprisonment *for debt*, but for a contempt of court. Bankruptcy proceedings are no bar, and although utterly unable to pay the amount, the attorney has no *right* to a discharge upon habeas corpus. *Smith* v. *McLendon*, S. C. Georgia, (Aug. T. 1877), 6 Reporter 139.

On such an application the attorney can be compelled to pay only what he has in fact collected for his client, and not *in that mode of proceeding*, any amount he failed or neglected to collect when he might have done so. *Croft* v. *Hicks*, 26 Texas 383 (1862).

But a motion for such purpose is entertained only on motion of *the client*. It is a privilege given to clients for their protection against exactions and overreachings, which the attorney, by reason of the confidence placed in him by his client, might resort to. But this extraordinary remedy is not extended to outside parties, or assignees of clients. *Hess* v. *Joseph*, 7 Robertson (N. Y.) 609 (1867).

Therefore when an attorney, in settling an account with an executor who had employed him, retained in his hands a legacy duty to be paid to the stamp office, the latter could not apply by this summary process to have the attorney ordered to pay it over. *In re Fenton*, 3 Ad. & E. 404 (1835).

2. *As to the question of champerty* there is no little difference of opinion. The first view is that a contract is void where an attorney agrees to carry on the suit and pay or advance the expenses of litigation, or to indemnify the client against the same, for some share of the proceeds, land or money. The English decisions are so uniform on this subject it is unnecessary to cite them here. As proof of the steady adherence to the old rule, the learned reader is referred to the recent case of *Hilton* v. *Woods*, Law Rep. 4 Eq. 432 (1867).

And some American courts have adopted the English rule in all its vigor. *Thurston* v. *Percival*, 1 Pick. 415 (1821), is perhaps the leading case in America on this point.

Rhode Island, in an important case, in 1866, adopted the same view. *Martin* v. *Clarke*, 8 R. I. 389. And see *Coquillard* v. *Beares*, 21 Ind. 479 (1869); *Lafferty* v. *Jelley*, 22 Id. 471 (1864); *Byrd* v. *Odem*, 9 Ala. 755 (1846); *Holloway* v. *Lowe*, 7 Porter 488 (1838); *Elliott* v. *McClelland*, 17 Ala. 206 (1850); *Key* v. *Vattier*, 1 Ohio 132 (1823); *Weakley* v. *Hall*, 13 Id. 167 (1844); *Brown* v. *Beauchamp*, 5 T. B. Mon. 413 (1827); *Thompson* v. *Warren*, 8 B. Mon. 488 (1848); *Boardman* v. *Brown*, 25 Iowa 487 (1868), reviewing the cases; *Satterlee* v. *Frazer*, 2 Sand. 141 (1848); *Berrien* v. *McLane*, 1 Hoff. Ch. 421 (1840); *Merritt* v. *Lambert*, 10 Paige 352 (1843), affirmed in 2 Denio 607; *Stearns* v. *Felker*, 28 Wis. 594 (1871).

The common-law rule does not grow out of the relation of solicitor and client, but applies equally to others; and in England an agreement by one not an attorney to procure information and furnish evidence to enable another to substantiate his claim, upon condition of receiving a portion of the proceeds, is invalid. *Stanley* v. *Jones*, 7 Bing. 369; 5 M. & P. 193 (1831). And see *Sprye* v. *Porter*, 7 E. & B. 58 (1856); *Reynell* v. *Sprye*, 8 Hare 222 (1849); s. c. 1 D., M. & G. 660.

On the other hand in some states the old common-law rule is altogether repudi-

ated, and it is held that no such contract is now invalid, unless it contravenes some existing statute of the state. Such was the carefully considered case of *Sedgwick* v. *Stanton*, 14 N. Y. 289 (1856); *Durgin* v. *Ireland*, Id. 322.

And such, perhaps owing to their code allowing attorneys to make any agreement with their clients, is probably the established law in New York: *Voorhees* v. *Dorr*, 51 Barb. 580 (1868); *Richardson* v. *Rowland*, 40 Conn. 572 (1873), a decision on a contract made in New York, and, therefore, governed by the laws thereof.

The same rule exists in California and perhaps other states. *Matthewson* v. *Fitch*, 22 Cal. 86 (1863); *Hoffman* v. *Vallejo*, 45 Id. 564 (1873.) And see *Lytle* v. *The State*, 17 Ark. 609 (1857).

The second class of cases make it unimportant whether the attorney or the client are to pay the expenses. Most notably in this class perhaps is the case of *Lathrop* v. *Amherst Bank*, 9 Met. 489 (1845), in which the point was distinctly made, and overruled. DEWEY, J., said upon this point, "It was suggested in the argument that the facts here shown do not bring the case strictly within the definition of champerty, as the plaintiff was not to conduct the suit wholly at his own expense, but was, in the event of a failure to sustain the action, to be remunerated for his actual expenses. It is true that some of the elementary books, in defining champerty, say that 'the champertor is to carry on the suit at his own expense,' as 4 Bl. Com. 135; Chit. Cont. (5th Am. ed.) 675. Other books of equal authority omit this part of the definition of champerty; as in 1 Hawk. c. 84, § 1; Co. Litt. 368 *b*. Maintenance and champerty, if we are to judge from the manner in which they are usually introduced in connexion with this subject, are deemed illegal, not from the consideration that all the expenses of the litigation are to be borne by a stranger, but in reference to the evils resulting from officious intermeddling, and upholding another's litigation by personal services as well as money; more dangerous formerly than now, as more powerful combinations were resorted to with a view of controlling, if not overawing, the judicial tribunals." The same view was entirely approved in the well considered cases of *Scobey* v. *Ross*, 13 Ind. 117 (1859), and *Backus* v. *Byrns*, 4 Mich. 535 (1857).

And the Court of Appeals in Kentucky had declared twenty years before that Hawkins's definition was correct, and that it was not essential that the attorney carry on the suit at his own expense. *Rust* v. *Larue*, 4 Litt. 419 (1823). And see *Davis* v. *Sharron*, 15 B. Mon. 64 (1854), decided however upon a statute of Kentucky.

On the other hand some very respectable courts hold such agreement an essential feature to constitute champerty, and declare that a mere agreement to divide the proceeds, with no undertaking or obligation to pay any part of the expenses is not invalid. *Allard* v. *Lamirande*, 29 Wis. 502 (1872), is a carefully considered case on that precise point. And so are *Bayard* v. *McLane*, 3 Harrington 139 (1839); *Benedict* v. *Stuart*, 23 Barb. 420 (1856); *Moses* v. *Bagley*, 55 Geo. 283 (1875).

Such is the rule in Missouri. *Duke* v. *Harper*, 5 Reporter 624 (Oct. T. 1877) 66 Mo.

As to a per centage on the amount recovered. The courts of the United States allow attorneys to stipulate for a reasonable per centage of the amount recovered, as a compensation for services. *Wylie* v. *Coxe*, 15 How. 415 (1853), five per cent.; *Wright* v. *Jebbitts*, 91 U. S. Rep. 252 (1875) ten per cent.

But in many courts a contract to pay a solicitor any per centum of the amount recovered is open to objection. *Strange* v. *Brennan*, 16 Sim. 346 (1846); affirmed in 2 C. P. Cooper 1; *Thurston* v. *Percival*, 1 Pick. 415 (1821); *Lathrop*

v. *Amherst Bank*, 9 Met. 491; *Elliott* v. *McClelland*, 17 Ala. 206 (1850); *Pince* v. *Beattie*, 32 Law J. Ch. (N. S.) 734 (1863).

As to contingent fees. The English courts are decidedly opposed to the validity of a contract between attorney and client for a contingent fee dependant upon success in a suit, especially when the attorney is to advance all sums necessary to carry on the litigation. *Earle* v. *Hopwood*, 10 C. B. N. S. 566 (1861), in which the client stipulated to pay his attorney "over and above all legal costs and charges incurred, a sum of money according to the interest and benefit to him from the possession of the estate in litigation, and sufficient to compensate and reward the attorney for making the advances, and incurring the liabilities, and devoting his utmost skill, care and labor in instituting and carrying on and defending the proceedings," the client being without means of paying in case of failure. Under this agreement the plaintiff brought suit for 30,000*l.* Upon demurrer the court gave judgment for the defendant, saying that the bargain fell precisely within the rule as to maintenance. The only difference being that in the former the party would have the security of the property, whereas here he has only the personal security of the defendant. But if the defendant be a solvent man, he gets a share of the property by another mode, viz., by suing him and obtaining judgment.

On the other hand, the Supreme Court of the United States, in a recent case, have distinctly recognised the validity of such contracts. *Stanton* v. *Embrey*, 93 U. S. Rep. 548 (1876); *Ex parte Plitt*, 2 Wall. Jr. 453 (1853); *Stanton* v. *Haskin*, 1 MacArthur 558 (1874). And so have some of the state courts. *Allard* v. *Lamirande*, 29 Wisconsin 502; (1872); *Newkirk* v. *Cone*, 18 Ill. 449 (1857). And this is allowed by statute in New York. *Fitch* v. *Gardner*, 2 Keyes 616; *Hetchings* v. *Van Brunt*, 38 N. Y. 335; *Porter* v. *Parmly*, 39 N. Y. Superior Court 232.

In Iowa also a contract for a contingent fee is upheld, there being no agreement that the attorney pay expenses, nor that the client should not settle the case, "nor any other objectionable matters pointed out in *Boardman* v. *Brown*, 25 Iowa 489." *McDonald* v. *Chicago &c. Railroad Co.*, 29 Iowa 171 (1870).

Under this head of contingent fees may perhaps be ranked those cases which while they refuse to allow an attorney to have a direct interest in the subject-matter of a suit, do allow him to stipulate for compensation to an *amount equal* to one-half of the amount recovered; it being, they say, a client's right to regulate his attorney's fee by the value of one-half the property in contest, as well as by the value of any other property. See *Wilhite* v. *Roberts*, 4 Dana 172 (1836); *Evans* v. *Bath*, 6 Id. 479 (1838); *Ramsey* v. *Trent*, 10 B. Mon. 341 (1850). But this is certainly approaching very near the line.

EDMUND H. BENNETT.

Supreme Court Commission of Ohio.

THE ERIE RAILWAY COMPANY *v.* E. T. STRINGER.

In regard to the jurisdiction of the federal courts, a corporation is a citizen of the state by which it was created.

A foreign railroad corporation does not become an Ohio corporation or a citizen of Ohio by merely leasing, possessing and operating in that state, the property of an Ohio railroad company.

The Ohio statute in regard to corporations, of March 19th 1869, so far as it provides that the leasing and operating of an Ohio railroad by a foreign company shall be taken as a waiver of the right to remove cases brought against it to the United States courts, is repugnant to the Constitution and Laws of the United States, and it, therefore, does not create a statutory waiver of that right.

When a foreign corporation is sued by a citizen of the state in a state court, it is entitled to have the case removed to a federal court under the statutes of the United States.

The several rulings in the case of the *B. & O. Railroad Co.* v. *Cary*, 28 Ohio St. 208, re-affirmed.

Where in an action pending in a state court, the petition of the defendant for the transfer of the case to a Circuit Court of the United States is improperly overruled, such defendant is not bound, in order to preserve his right of removal, to disregard the overruling of his application, and proceed to perfect the transfer of his case, but may, without abandoning such right, remain in the state court, and prevent, if possible, the prejudicial effect of its erroneous ruling by all the means authorized by the laws of the state.

On June 2d 1870, the defendant in error filed his petition, in the Court of Common Pleas of Ashland county, against the Erie Railway Company, to recover damages for being wrongfully ejected from a passenger train by a conductor of the defendants' train. He claimed damages in the sum of $5000. Process was issued and duly served upon one of the company's station agents. On September 5th, the plaintiff in error, being a corporation created and organized under the laws of the state of New York, filed its petition in the ordinary form to remove the case for trial into the Circuit Court of the United States, and at the same time tendered a bond in accordance with the Act of Congress.

The defendant in error filed an answer, *inter alia*, as follows:

"That said Erie Railway Company did lease from the Atlantic and Great Western Railway Company, the exclusive right to the use and control of said road for the term of years from and after the making of said lease; that a portion of the said Atlantic and Great Western Railway so leased by the said Erie Railway Company as aforesaid is in the state of Ohio.

"That at the time of the committing of the grievances complained of by him in his petition filed in this case, and for which he has brought suit, the said Erie Railway Company were the lessees of the Atlantic and Great Western Railway Company, and as such lessees, by force of the statute, &c., waived their right to remove this cause from this court, as prayed for in said petition."

To this answer the plaintiff in error replied that it did not operate said Atlantic and Great Western Railway under the lease from

the said Atlantic and Great Western Railway Company, such as is contemplated by the said statute, but under a permission or lease made and given by Reuben Hitchcock, a receiver of the said Atlantic and Great Western Railway Company, appointed by the Court of Common Pleas of Summit county, Ohio, and under the authority of the said last-named court during the pendency of a certain action therein pending.

The lease referred to attached to this reply bore date February 24th 1870, and was a contract between Reuben Hitchcock, as the receiver of the Atlantic and Great Western Railway Company, setting forth that it is made in pursuance of an order of the Court of Common Pleas of Summit county, Ohio, and an order of the Supreme Courts of the states of New York and of Pennsylvania. The lease, by its terms, was to continue through the receivership of the said Hitchcock, the lessor, unless sooner put an end to by order of the court upon cause shown, and by the terms of the lease the Erie Railway Company was to maintain the road in good order and operate it for seventy per cent. of the gross earnings thereof.

At the October term of 1870, the following decision was made by the court:

"This case came on to be heard upon a petition, answer, reply and exhibits, on consideration whereof the court find that the petitioner is a citizen of the state of New York; that the said E. T. Stringer is a citizen of the state of Ohio; that the amount in controversy exceeds $500, exclusive of costs; that the said Atlantic and Great Western Railway Company is an Ohio corporation and railroad in the state of Ohio, and that the petitioner is in possession of and running and operating said Atlantic and Great Western Railway under the lease or instrument attached to the replication; and therefore the court hold and adjudge that, by virtue of the act of the legislature of Ohio, passed March 19th 1869, the petitioner waived its right to remove said cause to the Circuit Court of the United States, and refuse to allow the prayer of the petitioner, and order the said petition to be dismissed; to which ruling of the court the said Erie Railway Company except."

After the overruling of its petition for removal the Erie Railway Company filed, under protest, its answer to the petition of the defendant in error against it, to which the defendant in error replied, and the issue thus made up between the parties was twice tried by

a jury, the plaintiff in error having demanded a second trial under the statute.

On the second trial the jury rendered a verdict in favor of the plaintiff below.

A motion was made to set aside the verdict, which was overruled by the court, and judgment was entered against the plaintiff in error. A bill of exceptions was taken upon trial and the evidence set forth in the record. A petition in error was filed in the District Court by the plaintiff in error, and the judgment of the Court of Common Pleas was affirmed. A petition in error was then filed in this court to reverse the judgment of the District Court and the Court of Common Pleas. Among the errors assigned both in the District Court and here was that the Court of Common Pleas erred in overruling the petition for removal, and in proceeding with the action after the filing of such petition.

The opinion of the court was delivered by

SCOTT, J.—The plaintiff in error is a corporation created solely by the state of New York, and is therefore to be regarded as a citizen of that state. And the fact that it is operating a railroad of another corporation, part of which lies within this state, under a lease from the receiver of the latter corporation, does not give it the character of an Ohio corporation or affect its status as a citizen of New York. It was so held by this commission in the case of the *B. & O. Railroad Co.* v. *Cary*, 28 Ohio St. 208. And we see no reason to doubt the correctness of the views there expressed, and do not hesitate to reaffirm the doctrine of that case. Indeed, it would not be otherwise, even if the plaintiff in error were the absolute purchaser of the property and franchises which it is now operating and using as a lessee: *State* v. *Sherman*, 22 Ohio St. 411. The laws of this state which authorize foreign corporations to make contracts and transact business within their appropriate spheres of action, in this state, do not purport to create domestic corporations, but merely to permit and regulate the action within this state of existing foreign corporations.

The plaintiff in error then being sued by a citizen of this state in the Court of Common Pleas of Ashland county, had a right as a citizen of another state (the amount in controversy being more than $500), to ask for the removal of the case into the Circuit Court of the United States. Such right is clearly conferred by

the Judiciary Act of Congress of 1789. Plaintiff in error, in due time, exercised this right by petitioning in due form for such removal, and complying in all respects with the requirements of the Act of Congress in that behalf. The Court of Common Pleas overruled the application for removal, on the sole ground that by virtue of the Act of the Legislature of Ohio, passed March 19th 1869, the petitioner had waived its right to such removal. The statutory provision referred to is as follows: "Provided, that it shall be regarded as one of the conditions upon which a railroad company of another state may lease or purchase a railroad, the whole or any part of which is in this state, or make any arrangement for operating the same under the provisions of this section that such railroad company of another state thereby waives the right to remove any case from any of the courts of this state to any of the courts of the United States, or to bring a suit in any of the courts of the United States against any citizen of this state; and a violation of such condition shall operate as a forfeiture of all rights acquired under such lease, purchase or arrangement:" 66 O. L. 33.

Was the Court of Common Pleas justified by this enactment of the state legislature, in refusing the request for removal, and holding that the right of removal had been waived?

The power of a state legislature to require a foreign corporation to waive or forego the exercise of such right of removal, as a condition on which it is permitted to do business in this state, has been expressly denied by the Supreme Court of the United States. That tribunal of last resort in the determination of the question, holds such state legislation to be in conflict with the constitution and laws of the United States: *Home Insurance Co.* v. *Morse*, 20 Wall. 445; re-affirmed in *Doyle* v. *Continental Insurance Co.*, 4 Otto 535. And with proper deference we have followed and conformed to those decisions in the cases of the *Assurance Co.* v. *Peirce*, 27 Ohio St. 155, and *B. & O. Railroad Co.* v. *Cary*, *supra*. In conformity with these precedents it must be held that the Court of Common Pleas erred in finding and ruling that the plaintiff in error had waived its right of removal in virtue of the state enactment on that subject.

Nor did the plaintiff in error, defendant in the court below, by proceeding in the cause under protest after its application for removal had been overruled, waive or in any way lose the right to

call in question the further jurisdiction of the Court of Common Pleas: *Hadley* v. *Dunlap*, 10 Ohio St. 1.

A proper case having been made by the defendant below for the removal of the cause, the court had no discretion in the premises. Its imperative duty was "to accept the surety and proceed no further in the cause against the petitioner." It had no longer any rightful jurisdiction of the cause: *Gordon* v. *Longest*, 16 Pet. 97. And so long as the plaintiff in error continued to stand upon and assert its rights of removal, and declined to recognise the rightfulness of the jurisdiction thereafter improperly assumed, all the subsequent orders and judgments of the court, made and entered in the exercise of such assumed jurisdiction, would be utterly invalid as against the plaintiff in error. After the overruling of the application for removal, the defendant below submitted to the further jurisdiction of the Court of Common Pleas *involuntarily* and under protest. And after final judgment in that court, it declined to waive or abandon its rights in that behalf; and, on the contrary, continued their assertion, by seeking the reversal of such judgment in the District Court, on the very ground of error in refusing to grant its application for removal. And the District Court having affirmed the judgment, plaintiff in error is now here still demanding a reversal on the same ground. There has at no time been an acquiescence, on its part, in the exercise of the jurisdiction wrongfully assumed by the Court of Common Pleas.

But defendant in error now alleges that plaintiff in error failed and neglected to take the necessary steps to effect and perfect the removal of the cause to the proper Circuit Court of the United States, after the overruling of its application for removal; and it is claimed that such failure and neglect, taken in connection with the fact of its remaining in the Court of Common Pleas, though under protest, and demanding and exercising in that court its statutory right to a second trial, constitute a waiver of its right to have the cause transferred to the Circuit Court.

We know of no case in which it has ever been held that when a petition for removal has been improperly denied, the petitioner is bound, in order to preserve his right of removal, wholly to disregard such denial of his right, and seek an immediate remedy through the action of the courts of the United States. On the contrary, a defendant in a state court may, without prejudice to his right, prevent the injurious effect of its denial, if he can, by all the means author-

ized by the laws of the state. And, where these means are exhausted without effect, and his right has been denied by the highest tribunal of the state, he may then appeal, by writ of error, to the Supreme Court of the United States, the paramount and final arbiter of the question. This was the very course adopted in the case of *Gordon* v. *Longest*, *supra*. The idea does not appear to have occurred to either court or counsel in that case, that the plaintiff in error had lost his right to have the case transferred, by going to a trial in the state court of original jurisdiction, or by prosecuting a writ of error in the Court of Appeals of the state to reverse the judgment rendered against him. The Supreme Court of the United States said that the defendant below *might* have pursued a more summary remedy, but the cause having come into that court through the Supreme Court of the state, the judgment of affirmance by that court was reversed, and the cause remanded, with instructions that it should be transmitted to the court in which it originated, where an allowance of the petition for removal was directed to be entered *nunc pro tunc*. And in *Hadley* v. *Dunlap*, *supra*, where the defendant's application for removal was improperly refused by the Court of Common Pleas, and he thereupon proceeded to trial, and then took an appeal to the District Court from the decree rendered against him, and in the latter court renewed his application for a transfer of the case, the question made by the renewed application was reserved for the determination of the Supreme Court. It was conceded by the learned counsel for complainant in that case, that if the application for removal should have been granted by the Court of Common Pleas, the defendant had not lost the right to demand such removal by the trial in the court below, and the appeal of the case by the defendant. The court was of the same opinion, and ordered the case to be certified to the proper Circuit Court. In neither of these cases had the petitioner taken any steps after the overruling of his petition to effect an actual transfer of the case.

In the case of *Hatch* v. *The Ch., R. I. & Pacific Railroad Co.*, 6 Blatch. C. C. R. 105, it is said by Judge BLATCHFORD, "The right of the defendant to a removal is not dependent on the question whether the state court does or does not make an order for the removal. If it were so dependent, the refusal of the state court in a proper case to make such an order would make it impossible for the defendant to secure the removal except by carrying the suit through the state tribunal and then carrying it from the highest

state tribunal to the Supreme Court of the United States, under the 25th sect. of the Judiciary Act of 1789. A defendant is not, however, where a state court is improperly proceeding in a cause in violation of the 12th sect. of the Act of 1789, *restricted* to such mode of relief. Where the right to remove a cause is complete, the power of the state court in respect to the cause is at an end, and the defendant is not obliged to follow the cause further in any state court, either of original or appellate jurisdiction: *Kanause* v. *Martin*, 15 Howard 198. If he does all that is necessary to secure a removal, then whether the state court makes an order of removal or not, he can perfect the removal by entering in this court at the proper time copies of the proper papers, and his appearance and special bail if necessary. When that is done, the cause will proceed in this court."

This language clearly implies that whilst a defendant *may* disregard the refusal of the state court to allow the removal, and may perfect such removal without an order of allowance, yet that he is not bound to adopt this summary mode of effecting a transfer, and his failure to do so is no waiver of his right to call in question the continuing jurisdiction of the state court.

We find it unnecessary to consider the other errors assigned in this case. The judgments of both the courts below will be reversed, and the cause be remanded to the Court of Common Pleas, with instructions to certify the case to the proper Circuit Court of the United States.

JOHNSON, C. J., dissenting.—I most respectfully dissent from the opinion just announced, on two grounds.

1. I do not think the plaintiff in error was a citizen of another state, and as such entitled to a removal to the Circuit Court of the United States. Although the Erie Railway Company was chartered by the state of New York, and is, as to all causes of action growing out of the exercise of all corporate powers conferred by that state, "a citizen of another state" for the purpose of a removal, yet as the lessee of this road and franchises of the Atlantic & Great Western Railroad Company, an Ohio corporation, and as to causes of action growing out of the exercise of corporate powers directly derived from Ohio laws under said lease, I think it stands in the shoes of the lessor. The reasons for this conclusion are given in my dissent in the *B. & O. Railroad Co.* v. *Cary*, 28 Ohio St. 216,

and need not be repeated. Since that dissent was written the Court of Appeals of Virginia have unanimously affirmed the doctrine there claimed, and have endorsed that dissent with their approval. That court holds, that where a railroad company incorporated by another state leases a railroad lying in this state and operates it as owner, and an injury occurs on said road, the person having a right of action for such injury may sue in the courts of this state, and such company has no right to remove the suit to the federal court: *B. & O. Railroad Co.* v. *Wightman*, Va. L. J. 115, December 1877. See also *McGregor* v. *Erie Railway Co.*, 6 Vroom (N. J.) 115.

The second ground of dissent is, that the record shows an abandonment of the purpose to remove the cause, and a consent of the company to again submit the cause to the state court. The record shows that after the petition and bond were filed, the company utterly failed and neglected to perfect the removal to the Circuit Court by filing copies of the papers, as required by Act of Congress, and after the time had elapsed for so doing, waived its right to such removal, by a trial of the case without objection. That a party possesses the power to abandon his purpose to remove his cause after petition and bond filed, either by a withdrawal of the papers filed for that purpose or otherwise cannot be successfully disputed; that he possesses equal power to waive his right in an action pending as well *after* he has filed his petition and bond for a removal as *before*, seems to me to be too clear for argument. It is a personal right which may be waived as such case arises, at the option of the non-resident citizen. This was expressly decided in *Insurance Co.* v. *Morse*, 20 Wall. 451, where it was held, that a *general waiver* in advance by a citizen of another state of his right of removal was void, yet, "in a civil case he may submit his particular case in suit by his own consent to an arbitration or to the decision of a single judge; so he may omit to exercise his right to remove his suit to a federal tribunal as often as he sees fit in each recurring case. In these aspects any citizen may no doubt waive the rights to which he is entitled."

In *Home Ins. Co.* v. *Curtis*, 32 Mich. 402, the defendant, a foreign corporation, on the 20th of December 1873, filed a petition and bond for a removal in proper form, but made no motion for a removal, nor called the attention of the court to the fact. November 25th 1874, the parties went to trial without objection, and without questioning the jurisdiction of the state court. It was held,

all the judges concurring, that "whatever rights the company may have had upon the filing of the bond and petition, *it could waive* and it certainly, under the circumstances of this case, must be considered as having waived them." "The company could not go to trial upon the merits, take its chances upon the result and afterwards question the jurisdiction of the court." That a party can waive his right to a removal as well *after* as *before* the filing of his petition and bond, has been settled by the unanimous decision of this court in case of *Pollock* v. *Cohen*, in which the opinion is now being prepared, and will soon be reported. In that case the plaintiff, after his petition and bond in due form had been filed, his motion overruled and his exceptions entered, proceeded to trial without further objection, which resulted in a verdict and judgment against him.

He took the case on error to the District Court, but in assigning his errors, *omitted to assign* the overruling of the motion to remove as error. On error to this court, it is held that by this omission he waived the error and must be deemed to have waived his right of removal.

As the facts in the case at bar make a much stronger case of waiver than that of *Pollock* v. *Cohen*, I am unable to see how the two cases can be reconciled. That there was a waiver in this case and a full consent to a final trial in the Common Pleas is conclusively shown by the record.

The action was commenced June 2d 1870. The petition and bond for removal were filed September 5th 1870.

By the weight of authority, no action or order of the state court is required to perfect his right to a removal, and without such action the company might have filed the transcript in the Circuit Court and thus perfected a transfer of the case. It could have done this even if the court had refused to order a removal. At the October Term 1870, the order of removal was refused and exception was noted.

The bond which was filed with the petition, September 5th, was conditioned that the company would on or before the first day of the next session of the Circuit Court, file therein copies of the papers as required by the Act of Congress. The next session of the Circuit Court for the Northern District of Ohio commenced on the first Tuesday of October, the next on the first Tuesday of January, and the next on the first Tuesday of April. The case was finally

tried April 26th 1871, so that three terms had passed. November 9th 1870, an answer was filed under protest and issue joined. At the December Term 1870, without objection, the company being represented by counsel and defending, the case was tried to a jury resulting in a verdict and judgment for plaintiff.

The defendant demanded and was allowed a second trial under the statute upon giving the required undertaking. This was given January 17th 1871, and the case was again placed on the trial docket. At the March Term 1871, to wit, April 26th 1871, which was more than seven months after petition for removal was filed, and after the next session of the Circuit Court had commenced, without the transcript and copies being filed in the Circuit Court, the case was again tried without objection, the defendant being present and defending, which resulted in a second judgment for plaintiff. A motion for a new trial was made on several grounds, but neither in that motion nor in arrest of judgment was any objection made to the jurisdiction of the court.

The motion was overruled and a bill of exceptions taken, on the causes assigned in the motion, but no motion in arrest of judgment was filed. Error was prosecuted in the District Court, where one of the causes assigned was, that the Common Pleas erred in refusing to grant a removal. Since the case came into this court, the defendant in error has filed an answer, showing that no papers were ever filed in the Circuit Court of the United States. Here we have unmistakable evidence of waiver. The time for transfer had elapsed when the second trial was obtained at the request of the company. The condition of the bond it had given had been broken by neglect or failure, intentional, as we must infer, to perfect the transfer.

Until the papers were filed in the Circuit Court that court had no jurisdiction, except by certiorari or other process, on motion of the company to compel the clerk of the Common Pleas to certify up the papers. The case was not then in the Circuit Court. Its jurisdiction had not attached. The company had abandoned, for the time being at least, the intention to remove, and had concluded to take its chances in the state court. As was said in 32 Mich., before cited, it could not "take its chances on the result and afterwards question the jurisdiction."

The Act of Congress provides, that after petition and bond are filed the state court can proceed no further in the cause. This

is a provision in favor of the party seeking the removal. It is personal to him and does not divest the state court of jurisdiction over the subject-matter, but only over the person at his election. It is said that after petition and bond filed all further proceedings of the state court are *coram non judice* and void. Numerous decisions may be cited to this effect. Is it true in an unqualified sense? The opinion of the majority concedes that it is not, when stress is laid on the fact that the company saved its rights by answering under protest, and by assigning for error in the District Court the order of the Common Pleas refusing a removal. If all subsequent proceedings were *coram non judice* and void, no exception is necessary. If the court has no further power, and if some of the dicta are "that consent cannot give jurisdiction," then all further proceedings are *void*, whether under protest or objection, or by consent. The court had jurisdiction over the *subject-matter*. It is not within the power of Congress to divest it of this, but only of jurisdiction over the person, and that only at his option. Had the company complied with the Act of Congress, and filed copies of the papers in the Circuit Court, I concede the state court would have been completely ousted of all jurisdiction. Until that was done the jurisdiction of the Circuit Court did not attach; that is conceded. But according to the logic of the majority the case is out of the state court, but not in the Circuit Court. Where is it?

I concede, also, that if a party after removal is refused, stands on his rights, and continues to contest the case in the state court, and does not waive the question of jurisdiction, he may, after trial and final judgment, prosecute error on that ground. In such case he can have ample protection either in the state or federal courts. What I deny is, that he can speculate on his chances, after filing his petition and bond, by going to trial without objection, after he has failed to transfer the case, and if he gets defeated, then object to the jurisdiction of the court, but if he succeeds, insist on such jurisdiction. To have the benefit of the Act of Congress, he should comply with its provisions, as he is free to do, whatever the state court does, and in defiance of any order it may make. Much stress is laid on certain decisions, where the point now under discussion was not raised or considered, as to the effect that after the petition and bond for a removal have been filed, all further proceedings are *coram non judice*, and as is said here utterly invalid. While this may be, and probably is so, where a party stands on his rights and

complies with the conditions prescribed by the Act of Congress, it cannot be true in case of a waiver of the right to remove. The case of *Hadley* v. *Dunlap*, 10 Ohio St. 1, is a unanimous decision of the Supreme Court directly in conflict with this theory. In that case, the petition and bond for a removal was filed by the defendant, and the motion for such removal was overruled. After this, he answered to the merits, reserving his right of removal. Upon final trial, judgment was rendered on the merits against the defendant. He appealed to the District Court, and there renewed his motion for a removal, and the whole case was reserved for decision in the Supreme Court. The syllabus on that point is, "Where an application for the removal of a cause has been improperly overruled by the Court of Common Pleas, such error does not effect the jurisdiction of the Court of Common Pleas so as to render its judgment in the case void. But the application, if renewed in the District Court upon appeal, should be granted."

In considering this point the learned judge who delivered the opinion (SCOTT, J.) vigorously combats the doctrine laid down in *Gordon* v. *Longest*, 16 Peters 97 (much relied on in this case), "that every step subsequently taken in the exercise of jurisdiction is *coram non judice*." He says, "If we are to understand from this expression, that where a state court erroneously declines to certify a cause and proceeds to trial and final judgment therein such judgment is not merely *voidable* for error, but absolutely void for want of jurisdiction, it would seem to follow that no attempted appeal from such void judgment could confer jurisdiction on the District Court, and for want thereof, we would only direct the cause to be stricken from the docket. * * * But as the Court of Common Pleas had unquestioned jurisdiction, both of the parties and subject-matter of this controversy, prior to and at the time when the defendants moved that the court might certify it to the federal court, we do not think that an error of judgment in overruling the motion could oust the jurisdiction of the court." Again, "Full jurisdiction having once attached it must be held to continue until the case is disposed of, either by certificate or final judgment or decree, however erroneously it may have been exercised." This is an emphatic authority that such subsequent proceedings by the state court are merely voidable and not "*utterly invalid.*"

In *Eppinger* v. *Insurance Co.*, 4 Am. Law Rec. 585, the view now contended for was directly affirmed. That was the decision

of Judge WELKER (concurred in, it is said, by Justice SWAYNE) in the Circuit Court for the Western District of Ohio. How efforts at removal were made of the first, it is said, speaking of the effect of a failure to file copies of the papers in the Circuit Court, "it would seem, from the fact that the defendant, after having filed the first petition for removal, failed to file copies of the process, &c., in this court, and filed an answer in the state court, and then went to trial on the issue made as well as the filing of a subsequent petition, affidavit, &c., for removal in 1874, that it had waived any right to file the papers under that petition." The second petition for removal was filed February 23d 1874. The first day of the next session of the Circuit Court was April 7th 1874, and copies of the proper papers were not filed until August 26th 1875. After this petition was filed, and the transfer refused by the state court, the parties proceeded to trial, and judgment was rendered on a verdict against the party seeking a removal. On error to the District Court this judgment was reversed, and then the Common Pleas granted the order for removal, after which copies of the proper papers were filed in the Circuit Court. On a motion in the Circuit Court to dismiss the action, Judge WELKER held that it was the duty of the party to comply with the Act of Congress by filing such papers, regardless of the action of the state court, and by the failure to file the papers in time the Circuit Court did not obtain jurisdiction and therefore struck the case from the docket. Here the Court of Common Pleas, as in the case at bar, refused to order a removal, and proceeded to trial and final judgment against the party moving for a transfer. The cases are also alike in the fact that no steps were taken to transfer the case by filing the papers in the Circuit Court. It settles the proposition that the party must comply with the Act of Congress before the case is transferred from the jurisdiction of the state court. Most of the cases relied on in support of the opinion in this case simply decide that the right to have the case removed is perfected by filing the petition and proper security, not that the case is actually removed.

The first step to a removal is, to file the petition and bond. This is a condition precedent to the removal and not a removal. The removal consists in filing the papers in the Circuit Court. A party may perform the condition precedent, may perfect his right and still not exercise it after all. After the right to a removal is per-

fected, the state court is to proceed no further without the assent of the mover; but when it appears no removal has taken place within the proper time the presumption is the party has abandoned the removal. In *Insurance Co.* v. *Dunn*, 19 Wall. 214, the transfer was completed and the case was on the docket of the Circuit Court, and stress is laid on that fact. It is said, "the cause was out of the Common Pleas and in the Circuit Court." Again: "The conditions prescribed having been complied with, the Act of Congress expressly required the state court to proceed no further in the suit." Again, "It is not denied that the requirements of the Act of Congress have been fully complied with."

In *Dart* v. *McKinney*, 9 Blatch. 359; *Fisk* v. *The Union Passenger Railroad Co*, 8 Blatch. 299; *Dennistown* v. *Draper*, 5 Blatch. 336; *Osgood* v. *Ch. D. & Y. Railroad Co.*, 6 Bissel 332; *Ellerman* v. *N. O., M. & T. Railroad Co.*, 2 Wood 120; *French* v. *Hay*, 22 Wall. 250, and several other cases we have examined, where the doctrine relied on "that all proceedings subsequent to the petition and bond are *coram non judice*," were cases which had been actually transferred. It is conceded that in such cases the jurisdiction of the state court is ousted.

Our claim is, that when the conditions for removal have not been fully complied with by filing copies of the papers in the Circuit Court within the time fixed, the proceedings in the state court are only suspended and may be resumed again by consent of the party moving, or as I think it may be resumed without his consent after it is made to appear the cause has not been transferred.

I fully agree with the opinion that "so long as the plaintiff in error continued to stand upon and assert his right of removal * * * all subsequent proceedings were utterly invalid." But it is denied that in this case the plaintiff in error "continued to stand upon and assert its rights." The record shows that it has slept upon its rights for several months instead of standing on them with due diligence.

I am aware that numerous dicta and general remarks of eminent judges may be cited in support of the propositions, that all proceedings of the state court after petition and bond are filed for a removal are "*coram non judice* and void, utterly invalid, &c.," and that, "consent cannot give jurisdiction" (per SWAYNE, J.), 19 How. 224; but it is believed no carefully adjudicated case can be found, where the point now under consideration was decided, that

supports the opinion in this case. That consent cannot give jurisdiction over the subject-matter is obvious, but when the axiom is applied to the person of a litigant in a court, having complete authority to hear and determine the subject-matter, it is a gross misapplication of an admitted principle, not only unsupported by authority, but in violation of both principle and authority. All know how unsafe it is to rely on general remarks found in reported cases, not necessary to the decision of this point. Such generalities are dangerous guides and likely to mislead. It is only when the case in hand requires that the judicial mind shall be concentrated on a given point that its conclusions should be adopted as evidence of the law, or be entitled to weight. It is better to be guided by the certain light of sound legal principles, aided by reason and authority if we wish to reach a correct conclusion.

NOTE.—Since the foregoing dissent was written, the Supreme Court has, in the case of *The P. Railroad Co.* v. *People*, not yet reported, fully affirmed the principles, that a foreign corporation operating a railroad in Ohio under the laws of this state, derives all its powers and franchises to do so from Ohio laws, and is as to all acts done under such powers and franchises a domestic and not a foreign corporation. The opinion in that case fully sustains conclusions reached in the dissent in the case of *The B. & O. Railroad Co.* v. *Cary, supra.*

ASHBURN, J., concurred in this dissent.

Supreme Court of Indiana.

THE AMERICAN INSURANCE COMPANY *v.* JOHN HENLY.

An insurance company issued a policy against fire, for five years, the insured paying the first year's premium in cash and giving his note promising to pay a sum named on March 1st of the succeeding year, a similar sum on the same day of the next year, and so on for the four years. The policy contained a clause that in case of default of payment of any instalment of the premiums due upon this note for thirty days, the insurer should not be liable and the policy should become void, but that upon payment the policy should revive, and the liability of the insurer again attach, &c. *Held*, that the policy was voidable at the option of the insurer only; that the premium note was not void or voidable by the insured, and he could not escape his liability upon it by making default; and that at the end of the five years the insurer could recover the amount of the note.

APPEAL from the Wayne Circuit Court.

This was an action by the appellant against the appellee, upon a promissory note, signed by the appellee, in the following form, "For value received on Policy No. 81,130, dated the 9th day of March 1872, issued by the American Insurance Company of Chicago, Illinois, I promise to pay said company the sum of seven dollars and fifty cents on the 1st day of March 1873, and seven dollars and fifty cents on the 1st day of March 1874, and seven dollars and fifty cents on the 1st day of March 1875, and seven dollars and fifty cents on the 1st day of March 1876, without interest."

The facts appear in the opinion, which was delivered by

PERKINS, J.—The defendant answered, admitting the execution of the note, but averring that he is not liable on said note because "said note was given for insurance of the property hereinafter mentioned; the amount of each instalment of said note is the premium charged by the plaintiff for the year succeeding the date at which the instalment is to become due, by the terms of the note; that at the time defendant signed said note, it was attached to an application for insurance with plaintiff, which said application contained an agreement that if any instalment upon the premiums shall remain due and unpaid thirty days, then the policy issued upon the application, in consideration of such instalment, shall be null and void until the same is paid; that said application was signed at the same time the note was signed, and was an application for the insurance for which the note was given, and was a part of the contract for said insurance, a copy of which application is filed herewith and made part hereof." This application is addressed to The American Insurance Company of Chicago, asks for insurance upon the property therein described in the sum of $1500, and concludes thus: "The foregoing is a correct description of the property to be insured on which the insurance will be predicated. If any instalment upon the premium shall remain due, unpaid thirty days, then the policy issued upon the application, in consideration of such instalment, shall be null and void until the same is paid. JOHN HENLY, applicant."

Defendant further says, that afterwards the plaintiff issued to defendant on said application, a policy of insurance, and defendant received said policy by mail some time after he had signed said note and application, and after he had paid the cash premium for the year 1872, and had not seen said policy until he received the

same as aforesaid, and was not acquainted with its provisions in reference to the charter of plaintiff, which policy, among other things, contained a condition that the plaintiff shall not be liable for loss, if default shall have been made by the assured in the payment of any instalment of premiums due upon the note aforesaid, or in case of the assignment of the policy upon the instalment note of the assignee for the space of thirty days after such instalment shall become due, by the terms of said note; and said policy contains the further condition that when a promissory note is given by the assured for the cash premium it shall be considered a payment, provided such note is paid at or before maturity; but it is expressly understood and agreed by and between the parties hereto, that should any loss or damage accrue to the property hereby insured, and the note given for the cash premium or any part thereof remains unpaid and past due at the time of such loss or damage, then this policy shall be void.

The policy is made an exhibit, and it contains this further provision "that on payment by the assured or assigns of all instalments of premiums due under this policy and the instalment note given thereon, the liability of this company on this policy shall again attach and this policy be in force from and after such payment, unless this policy shall be void and inoperative from some other cause."

Defendant further says, that long before the commencement of this suit, when the first instalment of the said note fell due, defendant made default of payment of said instalment, in pursuance of the terms of the contract between plaintiff and defendant, as stated in the application and policy, and then at that time, elected to discontinue his insurance with plaintiff and notified plaintiff thereof; that the instalments of said note were the premium charged by the plaintiff for each year beginning on the 9th day of March 1873, and ending on the 9th day of March 1877, respectively, being seven dollars and fifty cents for each year, and that the premium for 1872 was paid by defendant cash in advance, March 9th 1872, wherefore, &c. To this answer a demurrer was overruled and exception entered.

The plaintiff replied that it is a corporation organized and incorporated under and in pursuance of an Act of the General Assembly of the state of Illinois, approved February 15th 1855, and the several acts amendatory thereof, enacted by said General Assem-

bly, copies of all which acts are filed herewith and made part hereof, and which constitute the charter of said insurance company, which charter is made a part of said insurance policy, thus: "This policy is made and accepted upon the above-expressed conditions, and the charter and by-laws of this company, which are to be resorted to and used to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for, and which are hereby made a part of this policy." And the plaintiff avers that said defendant made application to it at Chicago, whither it had, under an amendment to its charter, removed its principal office, for a policy of insurance in the sum of $1500, extending over a period of five years, on the property described, which application was accepted by the company, the policy issued, &c., described in the answer; that at the time defendant executed the note sued on to secure the different instalments as described in said note, that the payment of said instalments as they should become due, was the consideration on which said policy of insurance issued. "And the plaintiff avers that defendant failed to pay said instalments and the interest thereon; that they remain due and unpaid; that said insured property has not been destroyed, &c.; that on default of payment of said instalments severally, notice thereof was given to the defendant by the plaintiff, as required by the charter of the company, whereby all of said instalments became due after thirty days, &c.; wherefore the plaintiff demands judgment, &c.

A demurrer to this reply was sustained, and final judgment rendered for the defendant. The assignment of errors alleges that the Circuit Court erred: 1. In overruling the demurrer to the answer. 2. In sustaining the demurrer to the reply.

This was a suit by the insurance company against the assured on his premium note.

The answer seems to set up two grounds of defence: 1. That the policy of insurance is variant, in its terms, from the application. 2. That it became utterly void, as to all parties, on the default of the assured in paying the instalment of the premium secured by the note sued on.

The policy was issued by the plaintiff soon after the 9th of March 1872, and this suit was commenced upon the premium note June 9th 1876. During all this time no objection appears to have been made on the ground that the policy varied from the contract

pursuant to which it was issued, and it is not claimed that it is not in accordance with the charter of the company, of the provisions of which the assured would be presumed to have notice, and which are expressly made part of the policy. There is nothing in this point. The assured did not put his refusal to pay instalments due upon this ground.

The policy accords with the application and neither or both make the policy void, on the failure of the assured to pay an instalment of the premium note, but only voidable at the option of the insurance company. It is no part of the contract that the assured may at any time absolve himself from the contract, by voluntarily breaking it. This is plain from the terms of the application and policy, both of which declare that the policy shall be void during the continuance of such nonpayment, clearly implying, what the policy expressly asserts, that its operation shall be restored whenever such payment shall be made. Now, if it became absolutely void, forfeited by the simple fact of nonpayment, the subsequent payment could not continue its existence and operation. The word void is frequently carelessly used for voidable, as the meaning of the sentences or contracts in which it is used clearly shows.

The sense of this part of the policy then might be expressed thus: that during the continuance of a default of the assured in making payment of an instalment of the premium note, the policy should be voidable, and may be avoided at the option of the company.

And, had a loss occurred to the insured during such default, whereupon he had proceeded to sue the company upon the policy for the loss, the company would no doubt have defeated his recovery by setting up his default, and electing to avoid the policy.

But the question here is, not whether the assured, being in default, could recover from the company upon a loss, but whether the company, not being in default, can recover from the assured, who is, on his premium note.

If the stipulation in the policy had been such as rendered the contract utterly void, it is not necessary for us now to say what might have been its effect on the right of the company to sue.

The policy is not void but simply voidable by the company, and the premium note is not void nor voidable by the assured, the payee thereof. He retains his policy, the company retains the note against him. By the terms of the policy, if he pays the note

without suit, such payment will restore the suspended animation of the policy. If he pays it at the end of an execution, the payment will have the same effect. We are satisfied the company may maintain this suit upon the note. The note was given upon a valid and continuing consideration. The contract upon which it was given has not been forfeited, is not void; the company has the possession of, and the property in the note. She may maintain suit upon it, thereby if she collects it renewing her liability on the policy.

This is not a case of alienation of the property insured, but simply a failure to pay an instalment due on a premium note. Alienation, as a general rule, invalidates a policy whether it is so provided in the policy or not, because it terminates all interest of the assured therein, whereupon the policy becomes inoperative and ceases to have any validity as an indemnifying contract: Wood on Fire Insurance 537. Such is not the effect of the failure on the part of the assured to pay his premium note. The court erred in overruling the demurrer to the answer.

The judgment is reversed with costs; cause remanded for further proceedings in accordance with this opinion.

United States Circuit Court. District of Colorado.

ASHER A. WHITE *v.* COLORADO CENTRAL RAILROAD COMPANY.

The storage by a warehouseman of gunpowder in large quantities in the same room with other goods liable to be ignited by a fire or explosion of the powder, is negligence in itself, and where the fact is undisputed the court may pronounce it negligence as matter of law.

A railroad company or other common carrier keeping goods in its own warehouse until called for, is a bailee for hire, and liable as a warehouseman under the above rule, although the keeping of the goods is not a portion of its regular business as a carrier, but rather an appendage for the convenience of its patrons.

Negligence may be the proximate cause of injury, although it is not the sole or even the immediate cause.

A railroad company having transported dry goods as a carrier, stored them in its warehouse until the consignee should call for them. In the other end of the same warehouse, with large doors for putting in and taking out goods between, was stored a quantity of gunpowder. A fire occurred, without the fault of the company, by which the goods were burned up. An instruction to the jury that

the storage of powder in the same warehouse was negligence, and that if they should be satisfied from the evidence that the goods could and would have been saved had it not been for the fear of the powder which kept the firemen out of the building, the railroad company would be liable, *held*, to be correct.

MOTION for new trial. On the 1st of January 1878, plaintiff's intestate shipped a lot of dry goods and clothing, from Georgetown to Denver, over defendant's line. The goods were received at Denver and placed in defendant's warehouse on the morning of the 3d of the same month. Two days later they were destroyed by fire, which originated in the building without fault of defendant. The plaintiff brought this action to recover the value of the goods so destroyed.

The further facts appear in the opinion of the court, which was delivered by

HALLETT, J.—As to the first count in the declaration, in which plaintiff sought to charge defendant as a common carrier, the jury have found against the plaintiff, and thus all questions arising on that count have been eliminated from the case. On the second count, in which defendant is charged with negligence as a warehouseman, the jury found for plaintiff in the sum of $4704.75, and the motion now to be considered is directed against that verdict.

It seems from the evidence that defendant's warehouse was a long wooden structure, one hundred feet or more in length, and that the company's offices for transacting its freight business were kept in one end of it. These offices were divided off from the main building by partitions, and the remainder of the building was used for storing goods. At about the centre of the building, on each side and communicating with the part which was used for storage, were large doors, through which the goods were passed, when received into or taken out of the building. The plaintiff's goods when received were put in that end of the building which did not contain the offices, and, of course, at some distance from the doors last mentioned.

By the same train which brought plaintiff's goods a quantity of gunpowder, amounting to about one hundred and sixty kegs, was also received, and this powder was put, by defendant, in the same room with plaintiff's goods, but upon the other side of the doors before mentioned, and towards the offices which were at that end of the building, so that with reference to the doors, which opened through the warehouse, it may be correct to say that the

offices and the powder were in one end of the building, while the plaintiff's goods were in the other end of the same building. But the powder was in fact pretty near the door on that side where it lay, and between the offices and the plaintiff's goods. The fire, which destroyed the building and the goods, when first discovered, was in the roof immediately above the offices, and, of course, at some distance from the plaintiff's goods. Thus it appears that the fire was in one end of the building and the plaintiff's goods in the other, while the powder was between the fire and the goods, on the same side of the large doors, before mentioned, as the fire. This was the situation, when members of the fire department arrived in considerable force on the ground with their apparatus, for the purpose of extinguishing the fire. The weather was cold and some delay occurred before water was obtained, but three or four streams were soon brought to bear, so that under ordinary circumstances the flames might have been suppressed before half the building was destroyed.

One witness testifies that there was an opportunity to *cut off* the fire at the large doors before mentioned, by carrying the water in at that place and playing on the fire from the inside. But nothing of this kind was attempted, and, indeed, the firemen would not go within seventy or eighty feet of the building on the outside, because they feared injury from the powder. Some testimony was given at the trial, to show that this fear was unfounded; but if the experts, who testified on that point, had been present at the fire to explain the properties of gunpowder to the terrified firemen, it is doubtful whether the explanation would have been entirely satisfactory. The theory advanced is, that metallic cans, in which the powder was put, are so expanded and cracked by the heat of a burning building, that the powder escapes and in that condition, if ignited, it produces only a flash, which is not at all dangerous to those who are outside of the building. If, however, one who is inside the building, *swallows the fire*, as one of the witnesses said, it is deadly, so that even on this theory it was not safe to go into the building at the large doors before mentioned, for the purpose of suppressing the fire. So, too, a prudent person might well be excused from assuming that all of the cans would be cracked and laid open by the heat so as to render them harmless. Altogether it may be said that this evidence does not prove nor tend to prove that the powder was not dangerous to life in the situation where

it was found, but merely that the workmen might have approached the building more closely without danger to themselves. Whether they could have worked more effectively at a distance from the building of twenty-five or thirty feet than at a distance of eighty feet does not appear, but may be a matter of reasonable inference. It does, however, appear that the gunpowder prevented the firemen from going in at the large doors before mentioned with hose, and there operating against the fire. All the witnesses agree that this movement would, under the circumstances, have been full of danger, and it seems probable that it was not made for that reason. One witness testifies that he suggested it to the firemen, and was answered that it was dangerous to go there on account of the powder. Looking to the form of the building, the fact that it was built of wood and the situation of plaintiff's goods with reference to the fire, it also seems probable that the goods would have been saved, if the powder had not been stored in the building.

Upon the evidence then, showing or tending to show that the loss of the goods was due to the presence of powder in the warehouse, the court charged the jury as follows:—

"As to the second cause of action, the liability of defendant, if any exists, depends upon the effect of storing powder in the warehouse, if any were stored there. You are advised that storing a considerable quantity of powder in the same house with plaintiff's goods was negligent conduct, and if the loss was occasioned by the presence of powder in the house, the defendant is liable. In order to fix such liability, however, it must appear to you from the evidence, that the loss was certainly occasioned or produced by that cause. If those who were engaged in suppressing the fire would have been able to save plaintiff's goods and would have done so if no powder had been kept in the building, the defendant may be held; but if this is a doubtful matter, and it is uncertain whether the presence of the powder in the house occasioned the loss, the defendant is not liable. Upon that point you remember what the witnesses said about it. You determine as well as you can whether this loss certainly proceeded from that cause, from the presence of the powder. If it is doubtful in your minds upon the evidence here, whether the loss was occasioned by that, that is to say, if withdrawing the powder from the house, you think it still doubtful whether the goods would have been saved, the defendant cannot be held liable upon that. The only act of

negligence, as it seems to me from the evidence here, was the putting of the powder there, and you must be able to ascribe the loss to that cause, and certainly to that, if you are to hold the defendant upon that. That is the position in which that matter stands."

That this principle is applicable to ordinary warehousemen would appear to be beyond question. To store or deposit gunpowder in large quantities in any place in a city where it will endanger life and property is a public nuisance: *Cheatham* v. *Shearon*, 1 Swan. 213; *Myers* v. *Malcolm*, 6 Hill 292; *Hay* v. *Cohoes*, 2 N. Y. 159. The case in 6 Hill shows that the party storing the powder will be liable for any damage that may result from it, and the same view is expressed in some of the text books: Addison on Torts, vol. 1, 308; Wood on Nuisance, sect. 142. Warehouses are usually, if not always, located in cities where the danger from fire is great, and of course keepers of such houses must provide against the danger with reasonable care. It is often difficult to determine whether such care has been used, but no embarrassment is felt respecting the point now under consideration.

With reference to warehousemen in general, we have only to ask whether a prudent man would store a large quantity of gunpowder in a building with other goods in a populous city; whether that is the usual and ordinary course of business, to decide the question of negligence. But it is said that a railway company, which keeps warehouses for the convenience of the public and as a necessary appendage to the business of a carrier, is not to be put upon the footing of ordinary warehousemen; that the company is not a warehouseman by choice, but only through the negligence of its patrons, who will not take away their goods as soon as they are received at the company's depot; that as the company may lawfully carry all things, so may it lawfully store whatever it carries, and he who intrusts goods to its charge takes upon himself the risk of such storage. These suggestions are not without weight, but it is believed they ought not to prevail against the general rule, which exacts from a bailee for hire reasonable diligence in the care of property intrusted to him. That a railway company, keeping the property of its patrons in its own warehouse for a reasonable time, until it shall be called for, is to be regarded as a bailee for hire and not as a naked depository is now fully settled: *Norway Plains Co.*, v. *Boston and Maine Railroad*, 1 Gray 273; Wharton on

Negligence, sect. 478. As such, no reason is seen for relieving it from the duties and responsibilities which attach to that character of bailment.

It must be borne in mind that the company was not bound to carry the powder on its railway, and still less was it required to store so dangerous an article in its warehouse: *Boston & Albany Railroad Co.* v. *Shanly*, 107 Mass. 575; Wharton on Negligence, sect. 856. If the company was willing to incur the risk of carrying powder, it must be assumed that it was also willing to take upon itself the liabilities incident to such risk. So also it may be said, the matter of storing the powder was disconnected from and entirely independent of the carrying. Although the company had carried the powder, it was not bound to put it in its warehouse. The consignee might have been required to take away the powder in the very hour of its arrival at Denver, or it might have been sent to some warehouse prepared and kept for storing such articles. Putting it in the warehouse of the company was a voluntary act carrying danger to the property of others, and therefore wrongful in itself. That it was not an exercise of the reasonable care in preserving the plaintiff's property, which the law enjoined, seems to be too plain for argument.

Another objection to the charge is, that the powder, if at all instrumental in the destruction of plaintiff's goods, was not the proximate cause of that result. To support this objection insurance cases are cited, in which it has been held that loss occasioned by explosion of powder may be connected with the fire which ignited the powder as the proximate cause. Hence it is claimed that in all such cases the fire and not the powder is the proximate cause of loss. But there may be, and usually there is, more than one agency or means of producing loss. Take, for instance, the car loaded with oil, which escaped from the company's servant and ran down a steep grade and came in collision with a locomotive, which set fire to the oil, and thence it was communicated to plaintiff's house, the fire and oil united in the destruction of plaintiff's house, and the cause of all the mischief was a defective brake on the car. If there was negligence in respect to any one of these things, the person chargeable with such negligence was responsible for the loss: *Oil Creek and Allegheny Railway Co.* v. *Keighron*, 74 Penna. St. 316.

So also where dry grass was negligently allowed to remain in

heaps near defendants' railway, and fire was communicated to such heaps by a passing engine, and thence carried by the wind a distance of two hundred yards to plaintiff's cottage, which was destroyed, the defendant was held liable: *Smith* v. *London and S. W. Railway Co.*, Law Rep. 6 C. P. 14; Law Rep., 5 C. P. 98. The fire was, of course, a cause of mischief, but the wind and dry grass were also efficient in communicating the fire to the building, and the negligence was in respect to the grass only. If defendant had set the grass on fire negligently, or, if that had been possible, had caused the wind to blow, it would have been liable for the loss in the same manner.

On the same principle it was held, in Massachusetts, that one who negligently cut the hose, with which water was supplied for suppressing a fire, was liable for the damage occasioned by his wrongful act: *Metallic Compression Casting Co.* v. *Fitchburg Railroad Co.*, 109 Mass. 278. There, as in the case at bar, it was contended that the proximate cause of loss was the fire rather than the act of the defendant. But the court was of a different opinion, saying that "when a man cuts off the hose, through which firemen are throwing a stream on a burning building, and thereupon the building is consumed for the want of water to extinguish it, his act is to be regarded as the direct and efficient cause of the injury."

In all these cases it may be said that the fire is a proximate cause of loss, but it does not follow that it is the only cause standing in that relation to the result. And so, while it is true that plaintiff's goods were in fact destroyed by fire, it is also true that the gunpowder in the warehouse, by keeping the workmen from the fire, may have contributed to the loss in such way as will make it a proximate cause. "Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause:" Shearman and Redfield on Negligence, sect. 10.

Without further discussion of what seems to be plain, we have no doubt the powder was near enough as a cause of the loss to make the defendant liable for its negligence in putting it in the warehouse, if, as the jury have found, it directly contributed to the result, and this objection must be overruled.

The defendant further relies on the form of the instruction, claiming that the question of negligence was improperly withdrawn from the jury. It is not denied, and it cannot be successfully denied, that where the facts are established negligence may be a

necessary inference of the law, to be decided by the court: Shearman and Redfield on Negligence, sect. 11; *Tarwater* v. *Hannibal and St. Joseph Railroad Co.*, 42 Mo. 193; *Pittsburgh and Connellsville Railroad Co.* v. *McClurg*, 56 Penna. St. 294.

In some cases, as where the conclusion to be drawn is not direct and certain, the rule is otherwise: *Railroad Co.* v. *Stout*, 17 Wall. 663. But here the facts lead in but one direction.

It was admitted at the trial that defendants' warehouse was in the city of Denver, and whether powder was stored there, although it was not denied, was submitted to the jury on the evidence. It is difficult to discover any other fact that entered into the question of negligence, unless it be the dangerous properties of powder, and perhaps that is the point in controversy.

In the argument of this motion at the bar, counsel were understood as saying that the testimony of witnesses at the trial had raised a doubt as to the effect of powder exploding in a burning building. And if the question to be decided should be as to the effect of such explosion on the building itself and the contents thereof, their position would not be untenable. The testimony tended to prove that neither the building nor the goods therein were much injured by the explosion. But this is not the point to which the evidence was directed. As before explained, the question was whether the firemen were reasonably deterred by the presence of powder in the building, from effective work in extinguishing the fire. And so far was the evidence from showing or tending to show that the firemen were not so deterred that it tended rather to establish the inference of danger to life from the presence of that article, at least as to all those who should attempt to enter the building. So that the evidence referred to did not in any way affect the question of negligence, and if it bore on the other point, as whether the firemen were in fact hindered from operating against the fire, that matter was submitted to the decision of the jury on the evidence. Aside from this I cannot believe that it is in any case necessary or proper to ask a jury to find whether gunpowder is a dangerous compound. The fact is of universal notoriety, familiar to all men, and needs neither finding nor proof to establish it. What would be thought of the demand for such proof in a prosecution for assault with intent to kill and murder? Would it be said that the government must show that the gun was loaded with powder and ball, and that powder is an explosive substance